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SEP 5 1964

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 460

JOHN LAPINE and FRANCIS LAPINE,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners, John Lapine and Francis Lapine, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered on July 10, 1964, by said court in action No. 19356, which is entitled therein,

National Labor Relations Board,
Petitioner,
vs.
Jack W. Sellers, Virginia Sellers Roper, Gladys Sellers, and L. H. Penny, co-partners, d/b a. Coca-Cola Bottling Company of Sacramento, Coca-Cola Bottling Company of Marysville; Coca-Cola Bottling Company of Sacramento, Ltd., d/b/a Lake Tahoe Coca-Cola Bottling Company; Coca-Cola Bottling Company of Sacramento, Ltd.; C-C Concession Company, Inc.,
Respondents.

Said order permanently enjoined your petitioners herein and their agents and Stephen Marietta, the Marshal of the State court of the State of California, from further action and enforcement of their State court judgment by writ of execution levy and wherein Stephen Marietta, the Marshal of the State of California, was enjoined from turning over to petitioners the money in his possession by reason of the State court judgment and writ of execution levy then being processed by him. A copy of said order is printed in Appendix A hereto, infra page i.

CITATIONS TO OPINIONS BELOW

The judgment and order of the Court of Appeals was entered without the benefit of a memorandum opinion.

JURISDICTION

The judgment and order of the Court of Appeals was entered on July 10, 1964. Rehearing was denied and motion for stay was granted on August 5, 1964. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

When a State court officer duly acquires possession and control of funds under a writ of execution levy in enforcement of a final State court judgment, may a Federal court interfere with, enjoin or otherwise exercise any power with respect thereto?

STATUTES INVOLVED

The statutory provisions involved are as follows:

Title 28 *U.S.C.* 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28 *U.S.C.* 1651(a). Writs.

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

John Lapine and Francis Lapine, petitioners herein, obtained a judgment in the Superior Court of the State of California in and for the County of Sacramento on January 24, 1964, in action No. 147869 against one Gary Lechner in the total sum of Six Thousand Five Hundred Thirty Nine Dollars and Thirty One Cents ($6,539.31), which said judgment is final.

The complaint in the aforesaid action was filed on December 6, 1963, and thereafter the defendant therein, Gary Lechner, presented himself in the office of the plaintiff's counsel and acknowledged that he had consulted with his counsel and wished to allow judgment to be taken against him and that he expected to receive some money from the Coca-Cola Bottling Company in the future from an N.L.R.B. proceeding, which he agreed to use to satisfy the whole or a part of the aforesaid judgment.

That on June 9, 1964, plaintiffs, seeking satisfaction of said judgment, obtained a writ of execution issued out and under the seal of the Superior Court of the State of California in and for the County of Sacramento and levied upon, pursuant to said writ, monies then due and owing and unpaid to the said defendant, Gary Lechner, then in the possession of the respondents in said N.L.R.B. proceeding, to wit: Coca-Cola Bottling Company.

That thereafter, Stephen Marietta, the Marshal of the County of Sacramento, State of California, pur-

suant to the aforesaid writ, made demand upon the respondents above named under the levy of execution and said respondents in legal compliance of said writ turned over to said Marshal the sum of Four Thousand Two Hundred Two Dollars and Seventy Five Cents ($4,202.75) which said sum then represented monies then due, owing and payable by said respondents to Gary Lechner, the judgment debtor of said State court judgment.

That prior to the aforesaid execution levy on the Coca-Cola Bottling Company, hereinafter referred to as the Company, said Company had entered into an agreement for compliance with the National Labor Relations Board order with respect to said backpay award to said Gary Lechner with the approval of his counsel and with the approval of the counsel for the National Labor Relations Board and received the authorization and approval from the National Labor Relations Board to deliver the sum of money agreed on to Gary Lechner personally. The Company, having in its possession a check payable to Gary Lechner in the amount of Four Thousand Two Hundred Two Dollars and Seventy Five Cents ($4,202.75) and then being served with a writ of execution levy, was bound by State law to turn said funds over to said levying officer pursuant to said writ of execution. Said funds were in fact paid over to the Marshal of the State of California and are now in said Marshal's possession.

That thereafter, the judgment debtor, Gary Lechner, through his attorneys filed an alleged claim of exemption from said levy in said State court action.

That the hearing was held in the State court and the judgment debtors' claim of exemption was denied on June 29, 1964. The time for appeal having expired, this judgment of denial of claim of exemption is final and except for the order of the Ninth Circuit Court of Appeals, the funds in the hands of the Marshal would be paid over to the judgment creditor, your petitioners herein.

On June 19, 1964, the National Labor Relations Board, hereinafter referred to as the Board, filed its petition to enjoin and memorandum in support thereof and secured an order to show cause from the United States Court of Appeals for the Ninth Circuit, ordering your petitioners herein and the California State Court Marshal, Stephen Marietta, to show cause why they should not be enjoined from further proceedings or accepting any benefits from the writ of execution levy served upon the Company and further temporarily restrained petitioners and said Marshal from doing any of the aforesaid acts pending the hearing therein. That on June 29, 1964, said temporary restraining order was extended for a ten day period to and including July 7, 1964. That at the hearing on July 6, 1964, a further five day extension of the temporary restraining order was granted orally by the Court. That thereafter the order subject of this petition was entered on July 10, 1964, permanently enjoining your petitioners and Stephen Marietta from doing any of the acts more particularly set forth in said order. That the Board asserted jurisdiction of the United States Court of Appeals to

afford the ancillary relief prayed for by reason of Section 10(e) National Labor Relations Act as amended and Title 28 of the United States Code, Section 1651.

A petition for a stay order and a petition for rehearing were filed by petitioners on July 30, 1964. The petition for rehearing was denied and the motion for stay was granted by the Ninth Circuit Court of Appeals on August 5, 1964.

The Board's memorandum in support of its petition for injunction, at page 5 thereof, erroneously informed and misled the Court into believing that the First Circuit Court of Appeals in its holding in *N.L.R.B. v. Ozanne, Inc.*, 307 F. 2d 80 was consistent with the holding of the Ninth Circuit in *N.L.R.B. v. Sunshine Mining Corporation*, 125 F. 2d 757. The holding in *N.L.R.B. v. Ozanne, Inc.*, supra, was set forth in a two-paragraph opinion. The Board's memorandum set forth a portion of the first paragraph only and omitted therefrom the holding of the case which was set forth in the second paragraph consisting of eight lines. The holding of the First Circuit in this *Ozanne, Inc.*, case, as set forth in said omitted second paragraph of the Board's memorandum, indicates that the factual case presented therein is on all fours with the factual case presented to the Ninth Circuit Court and the First Circuit refused to enjoin but the Ninth Circuit has so far herein granted the requested injunctive relief. The closing paragraph of the *Ozanne, Inc.*, case showing it to be directly in point with the facts involved herein, reads as follows:

"However, we have now learned that while this matter has been pending in this court the debtor was defaulted in the state proceedings and the deputy sheriff, in due course, has collected from the employer on execution. Under these circumstances we will not enter an injunction."

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit Court of Appeals in this case granting the injunctive relief requested by the Board is directly in conflict with the decision of the First Circuit Court of Appeals in *N.L.R.B. v. Ozanne, Inc.*, 307 F. 2d 81. In the instant case at the time the injunction was granted and the order of July 10, 1964, entered, the Court was misled by the Board into believing that the First Circuit holding in *N.L.R.B. v. Ozanne, Inc.*, supra, was consistent with their holding in the *N.L.R.B. v. Sunshine Mining Company*, supra, whereas the facts in the instant case differ materially from the facts in the *Sunshine Mining Company* case and are directly in point with the facts presented in *N.L.R.B. v. Ozanne, Inc.*, decided by the First Circuit herein the injunctive relief requested was denied.

In the *Ozanne, Inc.*, case, the State court proceedings were final, the sheriff in due course had collected from the employer on execution and the Court therefore refused to grant the injunction. In the instant case, the debtor defaulted, judgment was final, writ of execution secured and at the time of the injunction,

the Marshal had collected from the employer on execution. On these facts the Ninth Circuit Court of Appeals granted the injunction by its order on July 10, 1964. For this decision to stand would be to place the holding of the Ninth Circuit on the same facts directly in conflict with the holding of the First Circuit as hereinabove indicated.

2. The importance of the preservation of uniformity of decision in Federal courts upon points solvable by Federal law is one of the strongest and most compelling reasons for granting certiorari herein. Clearly, the question presented is of importance in the administration of the National Labor Relations Act.

The decision of the Ninth Circuit Court is believed to be erroneous and the factual issues materially differ from its own decision in *N.L.R.B. v. Sunshine Mining Company*, supra. The conflicting decision of the First Circuit Court of Appeals in *N.L.R.B. v. Ozanne, Inc.*, supra, is correct.

The First Circuit decision in the *Ozanne* case is more in keeping with general public interest that the debtor should pay his creditors, and that this public interest is not in direct conflict with any of the policies of the National Labor Relations Act and petitioners see no necessary collision between these policies nor is there any reason advanced by the Board why said Board should protect any debtor-employee from the payment of his just legal obligations. Allowing that in certain situations the Federal courts

have power to interfere with proceedings in State courts, this power should be used sparingly and petitioners urge that it should not be exercised here where the actual res has been by consent of the Federal authority removed from their jurisdiction and control and is in the actual control and possession of the State authorities. Since there was no res before the Company issued the check payable to the judgment debtor-employee, and since the State court first took possession of the res thereafter by means of the execution levy, it is urged that the property was thereby withdrawn from the reach of the Federal authority and is presently in control and possession of the State authority, and therefore the Federal courts may not now exercise any power or control over the res, the power then being solely within the State court to hear and determine all controversies relating thereto. See *Toucey v. New York Life Ins. Co.*, 62 S. Ct. 139, 314 U.S. 118, 86 L.Ed. 100; *Farmers' Loan, etc., Co. v. Lake St. El. R. Co.*, Ill. 1900, 20 S.Ct. 564, 177 U.S. 51, 44 L.Ed. 667. See, also, *Oliver v. Parlin, etc. Co.*, Tex. 1900, 105 F. 272, 45 C.C.A. 200; *Hutchison v. Green*, CC Mo. 1881, 6 F. 833. In the instant case, there being no judgment or decree of any Federal court entered at the time that the Board authorized payment of the funds to the discriminatee judgment-debtor herein, petitioners urge this case does not come within the exceptions permitting the use of the injunctive process encompassed within the exceptions of Section 2283 of Title 28. To urge that the petitioners as judgment creditors herein must wait

until the funds are actually delivered into the hands of the National Labor Relations Board and then into the hands of the judgment debtor-employee and then pursue said judgment debtor to determine what he does with the funds in order to properly seize them in accordance with California law is unrealistic, and should the injunction of the Ninth Circuit Court of Appeals be allowed to stand herein, the effective result would be twofold; first, it would be the use of the Federal judicial injunctive process to enable a judgment debtor-employee to avoid the just payment to his judgment creditor and secondly, it would be to deprive the judgment creditor his sole remedy under California law of effecting collection of his final judgment, to-wit, a writ of execution levy.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated, Sacramento, California,
August 28, 1964.

Respectfully submitted,
THOMAS C. PERKINS,
JOHN E. BARBEAU,
By THOMAS C. PERKINS,
Counsel for Petitioners.

(Appendix Follows)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 19,356

National Labor Relations Board,
Petitioner,

vs.

Jack W. Sellers, Virginia Sellers Roper, Gladys Sellers, and L. H. Penny, co-partners, d/b/a Coca-Cola Bottling Company, of Sacramento, Coca-Cola Bottling Company of Marysville; Coca-Cola Bottling Company of Sacramento, Ltd., d/b/a Lake Tahoe Coca-Cola Bottling Company; Coca-Cola Bottling Company of Sacramento, Ltd.; C-C Concession Company, Inc.,
Respondents.

ORDER

This matter came on to be heard, on July 6, 1964, on the application of the National Labor Relations Board for a permanent injunction restraining the institution or prosecution of proceedings in the Courts of the State of California by certain alleged creditors of Gary M. Lechner, a former employee of Respondents. Having considered the petition, the memoranda filed by the various parties and having heard argument of counsel in open court, it is hereby, ORDERED, ADJUDGED AND DECREED that:

(1) John Lapine and Francis Lapine and their agents be and they are hereby permanently enjoined

from instituting, prosecuting, maintaining or perfecting any proceeding or from invoking any legal process to carry into effect, or from accepting any benefit from the Writ of Execution served upon Respondents insofar as the intent or effect of such proceeding, legal process of Writ of Execution is to attach the obligation of said Respondents under the Board's order issued against Respondents on April 24, 1964, to pay back wages to Gary M. Lechner; or from seeking to make or making said Respondents' obligation under said Board order attachable as a private debt; or from otherwise, in any like or related manner, interfering with or seeking to interfere with Respondents' compliance with any decree which this Court may enter enforcing said order of the Board; or from subjecting Respondents' obligation to pay back wages under Board's order to the jurisdiction or control of any court or legal authority other than this Court;

(2) Stephen Marietta, a Marshal of the State of California be and he is hereby permanently enjoined from turning over to John Lapine and Francis Lapine or their nominees any money or property which came into and is presently in his possession, custody or control by reason of any proceeding instituted by or on behalf of John and Francis Lapine to attach or levy against any obligation due or to become due under the Board's order issued against Respondents on April 24, 1964, for the reimbursement of back wages by Respondents to said Gary M. Lechner;

(3) Stephen Marietta, a Marshal of the State of California, be and he is hereby ordered to return to

Respondents a check in the sum of $4,202.75 currently in his possession, numbered 3621, drawn on the account of Respondents, and made payable to the order of

Stephen Marietta, Marshal,
Municipal Court-Sacramento,
Room 3, County Court House,
Sacramento 14, California

(4) Respondents be and they are hereby ordered to void the said check made payable to the order of

Stephen Marietta, Marshal,
Municipal Court-Sacramento,
Room 3, County Court House,
Sacramento 14, California

(5) Respondents be and they are hereby ordered to furnish to Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, a check made payable to the order of Gary M. Lechner, in the sum of $4,202.75, for the reimbursement of back wages to said Gary M. Lechner pursuant to an earlier agreement approved by the said Regional Director so that the Regional Director may tender this check to said Gary M. Lechner.

Dated at San Francisco, California, this 10th day of July, 1964.

J. Warren Madden
Judge, Court of Claims

Frederick G. Hamley
(Gilbert H. Jertberg)
United States Circuit Judges

(Endorsed) Filed July 10, 1964.
Frank H. Schmid, Clerk.